

This Opinion Is Not a  
Precedent of the TTAB

Hearing: September 23, 2021

Mailed: September 24, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*Theragun, LLC*

*v.*

*Theragen, Inc.*  
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Opposition No. 91250143  
—

Rod S. Berman and Jessica Bromall Sparkman of Jeffer Mangels Butler  
& Mitchell LLP for Theragun LLC.

Lynn E. Rzonca, Brian S.S. Auerbach, and Kristel Tupja of Ballard Spahr LLP  
for Theragen, Inc.  
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Before Bergsman, Coggins and Allard, Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Theragen, Inc. (Applicant) seeks registration on the Principal Register of the standard character mark THERAGEN and composite word-and-design mark THERAGEN reproduced below, both for “medical devices, namely, electrostimulatory devices for tissue, bone and/or joint treatment, medical treatment apparel, and a kit

comprising an electrostimulatory device and medical treatment apparel,” in International Class 10.<sup>1</sup>



The description of the mark reads as follows:

The mark consists of the stylized term “Theragen” appearing to the right of a miscellaneous intertwining design.

Color is not claimed as a feature of the mark.

Theragun, LLC (Opposer) opposes the registration of Applicant’s marks under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s marks so resemble Opposer’s two registered marks listed below, and Opposer’s alleged common law rights in these marks, as to be likely to cause confusion:

- Registration No. 5213141 for the mark THERAGUN, in standard character form, for the goods listed below:

Massage apparatus; Massage apparatus and instruments; Massage apparatus for massaging injured muscles; Massaging apparatus for personal use; Vibrating apparatus used to stimulate muscles and increase strength and physical performance for health and medical purposes; Electric massage appliances, namely, electric vibrating massager; Electric massage appliances, namely, electric

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<sup>1</sup> Serial Nos. 88369252 (standard character form) and 88369266 (composite) both filed April 3, 2019, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant’s assertion of a bona fide intent to use the marks in commerce.

vibrating massager; Foot massage apparatus, in International Class 10; and

Hats; T-shirts; Athletic apparel, namely, shirts, pants, jackets, footwear, hats and caps, athletic uniforms; Athletic apparel, namely, shirts, pants, jackets, footwear, hats and caps, athletic uniforms; Baseball caps and hats; Short-sleeved or long-sleeved t-shirts, in International Class 25.<sup>2</sup>

• Registration No. 4760327 for the mark THERAGUNZ, in standard character form, for the goods listed below:

Vibrating apparatus used to stimulate muscles and increase strength and physical performance for health and medical purposes, in International Class 10; and

Hats; shirts; socks, in International Class 25.<sup>3</sup>

Applicant, in its Answer, denied the salient allegations in the Notice of Opposition. Applicant also pleaded purported affirmative defenses that are not affirmative defenses but rather amplifications of Applicant's denials.

**I. Applicant's motion to strike Opposer's rebuttal testimony declarations.**

On November 2, 2020, Opposer introduced the rebuttal testimony declarations of Dr. Jason Wersland, Opposer's Chief Wellness Officer,<sup>4</sup> and Kevin Tsao, Opposer's Senior Vice President of Digital.<sup>5</sup>

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<sup>2</sup> Registered May 30, 2017.

<sup>3</sup> Registered June 23, 2015; Section 8 affidavit accepted.

<sup>4</sup> 14 TTABVUE.

<sup>5</sup> 15 TTABVUE. The Board posted the portions of the Tsao declaration designated confidential at 16 TTABVUE.

On January 29, 2021, Applicant filed a motion to strike Opposer's rebuttal declarations on the grounds that Opposer did not properly disclose the witnesses and that both declarations are improper rebuttal.<sup>6</sup> Applicant argues:

Both of these declarations should be stricken. First, neither Mr. Tsao nor Dr. Wersland were identified as witnesses by Opposer at any stage of this opposition, and as such their declarations can be summarily stricken. Second, the evidence submitted in both the Tsao and Wersland Declarations pertains directly to Opposer's case-in-chief. Its untimely inclusion in rebuttal declarations affords Applicant no opportunity to respond, and therefore renders it improper rebuttal evidence.<sup>7</sup>

In opposition to Applicant's motion, Opposer asserts that it disclosed the witnesses in "Opposer's Rebuttal Disclosures"<sup>8</sup> and argues Applicant waived the objections by failing promptly to raise them, instead objecting only when Applicant filed its brief.<sup>9</sup>

Pursuant to TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 707.03(b)(3) (2021), "[w]hen testimony has been presented by affidavit or declaration, but was not covered by an earlier pretrial or rebuttal disclosure, the remedy for any adverse party is the prompt filing of a motion to strike." "As a general rule, [procedural] objections that are curable must be seasonably raised, or they will be deemed waived." *Nahshin v. Prod. Source Int'l, LLC*, 107 USPQ2d 1257, 1259 (TTAB 2013). *See also Moke Am. LLC v. Moke USA, LLC*, 2020 USPQ2d 10400, \*4 (TTAB 2020); TBMP § 707.03(a) ("Objections to trial testimony are not waived for

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<sup>6</sup> 19 TTABVUE.

<sup>7</sup> 19 TTABVUE 3.

<sup>8</sup> 22 TTABVUE 2 and Exhibit A (22 TTABVUE 9-11).

<sup>9</sup> 22 TTABVUE 2 and 4.

failure to make them during or before the taking of the deposition, provided that the ground for objection is not one that might have been obviated or removed if presented at that time.”).

“[O]bjections to ... testimony, on substantive grounds, such as that the proffered evidence constitutes hearsay or improper rebuttal, or is incompetent, irrelevant, or immaterial, generally are not waived for failure to raise them promptly, unless the ground for objection is one which could have been cured if raised promptly.” TBMP § 707.04; *Moke Am. LLC*, 2020 USPQ2d 10400 at \*4; *Anthony's Pizza & Pasta Int'l v. Anthony's Pizza Holding Co.*, 95 USPQ2d 1271, 1273, n.4 (TTAB 2009) (“plaintiff’s hearsay objection to Ms. Delegal’s testimony is not waived”), *aff'd*, 415 F. App’x 222 (Fed. Cir. 2010).

We turn first to Applicant’s objection on the ground that Opposer’s rebuttal witnesses were not properly disclosed. Each party to an inter partes proceeding must serve initial disclosures that identify “each individual likely to have discoverable information – along with the subjects of that information – that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment.” Fed. R. Civ. P. 26(a)(1)(i). *See also* Trademark Rules 2.116(a) and 2.120(a)(2), 37 C.F.R. §§ 2.116(a) and 2.120(a)(2); TBMP § 533.02(b).

When identifying individuals in initial disclosures, a party need not identify all those that may be called at trial as potential “trial witnesses,” and instead must identify any trial witnesses through pretrial disclosures. However, because individuals identified through initial disclosures have knowledge that the disclosing

party may use to support its claims or defenses, the persons identified in initial disclosures may reasonably be viewed as possible trial witnesses. *Spier Wines (PTY) Ltd. v. Shefer*, 105 USPQ2d 1239, 1241-42 (TTAB 2012) (citing *Jules Jurgensen/Rhapsody, Inc. v. Baumberger*, 91 USPQ2d 1443, 1443 n.1 (TTAB 2009)); *Great Seats, Inc. v. Great Seats, Ltd.*, 100 USPQ2d 1323, 1326 n.5 (TTAB 2011) (“If the identity of the witness is known when initial disclosures are made, and the relevant knowledge of the witness is known, then a party may have to disclose the identity of the witness when making initial disclosures, even if the party has no plans at that time to rely on testimony from the witness.”). A party’s failure to identify a witness in its initial disclosures deprives the adverse party of the opportunity to seek discovery of the identified witness, and this fact “must [be] consider[ed] ... as one of the relevant circumstances ... in determining whether to strike [the witness’s] testimony deposition.” *Spier Wines*, 105 USPQ2d at 1242 (quoting *Jules Jurgensen*, 91 USPQ2d at 1444-45).

Applicant, in its motion to strike, asserts “Opposer had previously failed to disclose any witnesses in its initial disclosures.”<sup>10</sup> However, Opposer identified Benjamin Nazarian, Opposer’s Chief Executive Officer, whom Opposer identified as likely to have discoverable information regarding Opposer’s goods, channels of trade, classes of consumers, advertising and marketing.<sup>11</sup> Opposer did not identify Dr. Jason

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<sup>10</sup> 19 TTABVUE 2. *See also* Applicant’s Motion to Strike Exhibit A (Opposer’s Initial Disclosures) (19 TTABVUE 13-18).

<sup>11</sup> Applicant’s Motion to Strike, Exhibit A (Opposer’s Initial Disclosures) (19 TTABVUE 13-18).

Wersland, Opposer's Chief Wellness Officer, or Kevin Tsao, Opposer's Senior Vice President of Digital, in its initial disclosures.

A party that fails to provide information via disclosure upon motion or objection by its adversary may be precluded from using that information or witness at trial, "unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1). *See also Spier Wines*, 105 USPQ2d at 1242 (citing *Great Seats*, 100 USPQ2d at 1326-27). To determine whether Opposer's failure to disclose Dr. Jason Wersland, Opposer's Chief Wellness Officer, and Kevin Tsao, Opposer's Senior Vice President of Digital, in its initial disclosures, is substantially justified or harmless, the Board is guided by the following five-factor test applied in *Great Seats*, namely: "1) the surprise to the party against whom the evidence would be offered; 2) the ability of that party to cure the surprise; 3) the extent to which allowing the testimony would disrupt the trial; 4) importance of the evidence; and 5) the non-disclosing party's explanation for its failure to disclose the evidence." *See Great Seats*, 100 USPQ2d at 1327 (internal citations omitted). *See also Spier Wines*, 105 USPQ2d at 1242.

Applicant contends that Kevin Tsao, in his rebuttal testimony declaration, testifies about Opposer's advertising methods, marketing expenditures, advertising reach, and fame, and that Dr. Jason Wersland, in his rebuttal testimony declaration, testifies about Opposer's goods and channels of trade.<sup>12</sup> It is de rigeur in Board proceedings for plaintiffs to introduce testimony and other evidence regarding these

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<sup>12</sup> Applicant's Motion to Strike (19 TTABVUE 2-3).

subjects in their case in chief. We note Applicant introduced notices of reliance on copies of third-party registrations for Thera-formative marks<sup>13</sup> and on Internet documents<sup>14</sup> to counter Opposer's allegations and evidence submitted in its opening testimony period regarding the strength of Opposer's THERAGUN mark. Applicant also introduced the testimony declaration of J. Chris McAuliffe, Applicant's Chief Executive Officer, who testified about Applicant's medical devices and how they differ from Opposer's products.<sup>15</sup> Accordingly, Applicant should not have been caught off guard by Opposer's proffered rebuttal testimony.<sup>16</sup> We find that Applicant should not have been surprised by the rebuttal testimony.

Inasmuch as Opposer identified Benjamin Nazarian, Opposer's Chief Executive Officer, whom Opposer identified as likely to have discoverable information regarding Opposer's goods, channels of trade, classes of consumers, advertising and marketing, Applicant had the opportunity to depose that witness during discovery and bind Opposer to that testimony. Accordingly, Applicant had the ability to prevent, if not cure, any purported surprise.

The rebuttal testimony declarations did not disrupt the trial.

Inasmuch as the proffered rebuttal testimony cover the goods at issue, channels

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<sup>13</sup> 11 TTABVUE 21-210.

<sup>14</sup> 11 TTABVUE 212-302, 331-369, and 380-383.

<sup>15</sup> 12 TTABVUE.

<sup>16</sup> If there were any surprise, it was that Opposer did not introduce that testimony during its case-in-chief.

of trade, classes of consumers and the strength of Opposer's mark, we find that those subjects are important.

Opposer did not explain why it did not identify Dr. Wersland and Kevin Tsao in Opposer's initial disclosures. In response to Applicant's Motion to Strike, Opposer simply argued that it identified those witnesses in Opposer's rebuttal testimony disclosures and, according to Opposer, that is all it needed to do.<sup>17</sup>

Upon balancing the particular circumstances presented in light of Applicant's Motion to Strike, we find Opposer's failure to identify its rebuttal witnesses in its initial disclosures was harmless. Although Opposer failed to explain why it did not identify Dr. Wersland and Mr. Tsao in its initial disclosures, Applicant was not surprised by the proffered testimony because the testimony covered facts found in every likelihood of confusion case before the Board. In addition, because Opposer identified its Chief Executive Officer as a person with knowledge about the facts at issue in Applicant's Motion to Strike, and because Applicant's Chief Executive Officer is a witness whose testimony binds Opposer, Applicant had the ability to prepare for the rebuttal testimony facts and prevent any purported surprise.

Finally, the failure to disclose properly a witness is not a defect that a party can cure if promptly raised because the party introducing the testimony discloses the witness after the time for filing pretrial or rebuttal disclosure has closed. Nevertheless, Opposer properly disclosed the witnesses in its rebuttal pretrial disclosures.

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<sup>17</sup> Opposer's Opposition to Applicant's Motion to Strike (22 TTABVUE 2 and 5).

We deny the motion to strike Opposer's witnesses on the ground that Opposer did not properly disclose those witnesses.

We turn now to the objection on the ground that the rebuttal testimony declarations of the above-identified witnesses is improper rebuttal. As noted above, an objection based on improper rebuttal is a substantive objection and not waived when a party fails promptly to raise it.

Opposer contends, "the challenged evidence was submitted specifically in response to and for the purpose of rebutting evidence by [Applicant]." <sup>18</sup> Opposer asserts it could not predict, nor expect, Applicant's witness to testify regarding the differences between the goods at issue, or that Applicant would introduce third-party registrations incorporating Thera-formative marks to show Opposer's marks are inherently or conceptually weak terms. <sup>19</sup> Thus, Opposer "determined that it should submit declarations to rebut this unexpected evidence." <sup>20</sup>

Dr. Wersland's testimony is specifically directed to contradicting Mr. McAuliffe's testimony, including his suggestion that the applied-for goods are available only by prescription and only through prescribing physicians. Mr. Tsao's declaration is specifically directed to [Applicant's] evidence and arguments regarding what consumers are exposed to in the marketplace. <sup>21</sup>

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<sup>18</sup> 22 TTABVUE 2.

<sup>19</sup> 22 TTABVUE 3. Specifically, Opposer anticipated Applicant would rely on testimony "about the limitations and specific nature of its intended goods" and "reliance on third-party registrations ... to support an argument that THERAGUN is a weak mark." *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

Opposer's arguments stretch credulity. In virtually every inter partes proceeding and ex parte appeal before the Board involving the issue of likelihood of confusion, the parties (or the examining attorney and applicant) introduce evidence and argument regarding the similarity or dissimilarity and nature of the goods or services at issue and the inherent and commercial strength of the plaintiff's mark or the mark in the cited registration. See, for example, the *DuPont* factors discussed below.<sup>22</sup>

Opposer, as the plaintiff in this proceeding, bears the burden of proof with respect to its claim of priority of use and likelihood of confusion. See, e.g., *Bose Corp. v. QSC Audio Prods. Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1305 (Fed. Cir. 2002) (“[t]he burden of proof rests with the opposer ... to produce sufficient evidence to support the ultimate conclusion of [priority of use] and likelihood of confusion”); *Hoover Co. v. Royal Appliance Mfg. Co.*, 238 F.3d 1357, 57 USPQ2d 1720, 1722 (Fed. Cir. 2001) (“[i]n opposition proceedings, the opposer bears the burden of establishing that the applicant does not have the right to register its mark”); *Champagne Louis Roederer S.A. v. Delicato Vineyards*, 143 F.3d 1373, 47 USPQ2d 1459, 1464 (Fed. Cir. 1998) (Michel, J. concurring).

Our determination of likelihood of likelihood of confusion under Section 2(d) of the Trademark Act is based on an analysis of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du*

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<sup>22</sup> We note that Opposer introduced a notice of reliance on copies of third-party registrations and websites to show that the goods of the parties are related. 7 TTABVue 52-120 and 122-182. Thus, despite the fact that Opposer introduced evidence to show that the goods are related during its case-in-chief, Opposer incredulously argues that it could not predict or expect Applicant would introduce testimony or evidence to counter Opposer's evidence.

*Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”).  
*See also, In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). Those factors include,

- the similarity or dissimilarity and nature of the goods,
- established, likely-to-continue channels of trade,
- the conditions under which and buyers to whom sales are made,
- the fame of the prior mark (sales, advertising, length of use), and
- the number and nature of similar marks in use on similar goods.

*DuPont*, 177 USPQ at 567.

In addition, active third-party registrations may be relevant to show that a mark or a portion of a mark is descriptive or suggestive that the public will look to other elements to distinguish the source of the goods or services. *See, e.g., Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129 (Fed. Cir. 2015); *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 1338-40, 115 USPQ2d 1671, 1674-75 (Fed. Cir. 2015); *Primrose Ret. Cmtys., LLC v. Edward Rose Senior Living, LLC*, 122 USPQ2d 1030, 1036 (TTAB 2016).

The burden is on Opposer, in the first instance, to come forward during its own testimony period with proof of the essential elements of its claims, including the above-noted likelihood of confusion factors. Opposer may not use its rebuttal period to submit testimony or other evidence that is properly part of its case-in-chief. *Jules Jurgensen/Rhapsody, Inc. v. Baumberger*, 91 USPQ2d at 1445 n.5. *See also*

Trademark Rule 2.121(b)(1), 37 C.F.R. § 2.121(b)(1) (“The Trademark Trial and Appeal Board will schedule a testimony period for the plaintiff to present its case in chief, a testimony period for the defendant to present its case and to meet the case of the plaintiff, and a testimony period for the plaintiff to present evidence in rebuttal.”).

Opposer should have introduced the testimony declaration of Kevin Tsao as part of Opposer’s case-in-chief and, therefore, we grant Applicant’s motion to strike the Tsao declaration as improper rebuttal.

However, with respect to the rebuttal testimony of Dr. Jason Wersland, we deny Applicant’s motion to strike to the extent that we will consider the rebuttal testimony only if it rebuts Applicant’s testimony or evidence instead of supporting Opposer’s case-in-chief. *See Helene Curtis Indus. Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618, 1625 n.33 (TTAB 1989) (finding opposer’s rebuttal survey bears on the validity and probative value of applicant’s survey and, therefore, considered to rebut applicant’s survey but not to support opposer’s case-in-chief).

## **II. The Record**

The record includes the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), the file of Applicant’s applications.<sup>23</sup> The parties introduced the testimony and evidence listed below:

### **A. Opposer’s Testimony and Evidence.**

1. Notice of reliance on copies of Opposer’s pleaded registrations printed from the USPTO Trademark Electronic Search System

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<sup>23</sup> Inasmuch as they were already of record, it was not necessary for Applicant to introduce copies of its applications at 11 TTABVUE 371-375.

(TESS) displaying the current status of and title to the registrations;<sup>24</sup>

2. Notice of reliance on copies of other registrations for Thera-formative marks owned by Opposer;<sup>25</sup>
3. Notice of reliance on copies of applications for Thera-formative marks filed by Opposer;<sup>26</sup>
4. Notice of reliance on copies of third-party registrations purportedly to show that the goods of the parties are related;<sup>27</sup>
5. Notice of reliance on excerpts from third-party websites purportedly to show that the goods of the parties are related;<sup>28</sup>
6. Notice of reliance on news articles from the Internet purportedly to show the renown of Opposer's marks;<sup>29</sup> and
7. The rebuttal testimony declaration of Dr. Jason Wersland, chiropractor and Opposer's Chief Wellness Officer.<sup>30</sup>

#### **B. Applicant's Testimony and Evidence.**

1. Notice of reliance on copies of third-party registrations for Thera-formative marks;<sup>31</sup>
2. Notice of reliance on Internet documents;<sup>32</sup>

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<sup>24</sup> 7 TTABVUE 13-15.

<sup>25</sup> 7 TTABVUE 17-27.

<sup>26</sup> 7 TTABVUE 29-50.

<sup>27</sup> 7 TTABVUE 52-120.

<sup>28</sup> 7 TTABVUE 122-182.

<sup>29</sup> 7 TTABVUE 184-327.

<sup>30</sup> 14 TTABVUE.

<sup>31</sup> 11 TTABVUE 21-210. We do not consider the applications introduced by Applicant because pending applications are evidence only that other applicants filed the applications on a certain date; they are not evidence of use of the marks. *Nike Inc. v. WNBA Enters. LLC*, 85 USPQ2d 1187, 1193 n.8 (TTAB 2007); *Interpayment Servs. Ltd. v. Doctors & Thiede*, 66 USPQ2d 1463, 1468 n.6 (TTAB 2003); *In re Juleigh Jeans Sportswear, Inc.*, 24 USPQ2d 1694, 1699 (TTAB 1992).

<sup>32</sup> 11 TTABVUE 212-302, 331-369, and 380-383.

3. Notice of reliance on dictionary definitions of the terms “gen” and “gun”;<sup>33</sup>
4. Notice of reliance on an excerpt from Applicant’s website (theragen.com);<sup>34</sup> and
5. Testimony declaration of J. Chris McAuliffe, Applicant’s Chief Executive Officer.<sup>35</sup>

### III. Entitlement to a Statutory Cause of Action<sup>36</sup>

Entitlement to a statutory cause of action, formerly referred to as “standing” by the Federal Circuit and the Board, is an element of the plaintiff’s case in every inter partes case. *See Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277 (Fed. Cir. 2020), *cert. denied*, \_\_\_ S. Ct. \_\_\_ (2021); *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837 (Fed. Cir. 2020), *reh’g en banc denied* 981 F.3d 1083, 2020 USPQ2d 11438 (Fed. Cir. 2020), *petition for cert. filed*; *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014). To establish entitlement to a statutory cause of action, a plaintiff must demonstrate: (i) an interest falling within the zone of interests protected by the statute and (ii) a reasonable belief in damage proximately caused by the registration of the mark. *Corcamore*, 2020 USPQ2d 11277 at \*4. *See also Empresa Cubana*, 111 USPQ2d at 1062; *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023,

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<sup>33</sup> 11 TTABVUE 304-329.

<sup>34</sup> 11 TTABVUE 377-378.

<sup>35</sup> 12 TTABVUE.

<sup>36</sup> Even though we now refer to standing as entitlement to a statutory cause of action, our prior decisions and those of the Federal Circuit interpreting “standing” under §§ 1063 and 1064 remain applicable.

1025 (Fed. Cir. 1999); *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (TTAB 1982).

Because Opposer has properly introduced into evidence copies of its pleaded registrations showing the current status of and title to the registrations, Opposer has established its entitlement to a statutory cause of action. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000); *Primrose Ret. Cmtys.*, 122 USPQ2d at 1032 (standing established based on pleaded registration made of record).

#### **IV. Priority**

Because Opposer has properly made of record copies of its pleaded registrations, and Applicant did not counterclaim to cancel them, priority is not an issue as to the marks and goods covered by the registrations. *See Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1469 (TTAB 2016) (citing *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d. 1400, 182 USPQ 108, 110 (CCPA 1974)).

#### **V. Likelihood of Confusion**

We base our determination under Section 2(d) on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion. *DuPont*, 177 USPQ at 567, cited in *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015). *See also Majestic Distilling Co.*, 65 USPQ2d at 1203. “In discharging this duty, the thirteen *DuPont* factors ‘must be considered’ ‘when [they] are of record.’” *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162 (Fed. Cir. 2019) (quoting *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997) and *DuPont*, 177 USPQ at 567). “Not

all *DuPont* factors are relevant in each case, and the weight afforded to each factor depends on the circumstances. Any single factor may control a particular case.” *Stratus Networks, Inc. v. UBTA-UBET Commc’ns Inc.*, 955 F.3d 994, 2020 USPQ2d 10341, \*3 (Fed. Cir. 2020) (citing *Dixie Rests.*, 41 USPQ2d at 1406-07).

“Each case must be decided on its own facts and the differences are often subtle ones.” *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 177 USPQ 386, 387 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services. *See In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”). *See also In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (“The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but ‘may focus ... on dispositive factors, such as similarity of the marks and relatedness of the goods.’”) (quoting *Herbko Int’l v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)).

For the sake of economy, we confine our analysis to the issue of likelihood of confusion between Applicant’s marks and the mark THERAGUN in standard characters in Opposer’s pleaded Registration No. 5213141 because this mark is the most similar to Applicant’s marks. If we dismiss the opposition based on this registered mark, we would not sustain the opposition based on Opposer’s pleaded

Registration No. 4760327 for the mark THERAGUNZ, in standard characters. *See In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

**A. The similarity or dissimilarity and nature of the goods.**

Applicant is seeking to register its marks for “medical devices, namely, electrostimulatory devices for tissue, bone and/or joint treatment, medical treatment apparel, and a kit comprising an electrostimulatory device and medical treatment apparel.”

Opposer registered the marks in its pleaded registration for, inter alia,

Massage apparatus; Massage apparatus and instruments; Massage apparatus for massaging injured muscles; Massaging apparatus for personal use; Vibrating apparatus used to stimulate muscles and increase strength and physical performance for health and medical purposes; Electric massage appliances, namely, electric vibrating massager; Electric massage appliances, namely, electric vibrating massager; Foot massage apparatus.<sup>37</sup>

Opposer introduced numerous use-based, third-party registrations for goods listed in both the applications and Opposer’s pleaded registration. Third-party registrations based on use in commerce that individually cover a number of different goods have some probative value to the extent that they serve to suggest that the listed goods are of a type that may emanate from the same source. *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-1786 (TTAB 1993); *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988), *aff’d mem.* 864 F.2d 149 (Fed. Cir. 1988). We list representative registrations, with relevant portions of the identifications, below:<sup>38</sup>

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<sup>37</sup> Registration No. 5213141 for the mark THERAGUN, in standard character form.

<sup>38</sup> 7 TTABVUE 52-120.

<b>Mark</b>	<b>Reg. No.</b>	<b>Goods</b>
TIMTAM	5391052	Massage apparatus; Electrical stimulation apparatus for muscles for rehabilitative, pain management and recovery purposes
PLAYMAKAR	5287799	Electrotherapy and modality devices for providing transcutaneous electrical nerve stimulation, neuro-muscular electrical stimulation; Massage for medical purposes
RXGUN	5768183	Electrical stimulation apparatus for muscles for rehabilitative and pain management purposes; Massage apparatus
RECOVERY BLADE	5843409	Massage apparatus; Electromedical rehabilitative and pain management products for clinical and home use, namely, electrical nerve and muscle stimulators, ultrasonic stimulators, magnet therapy stimulators and laser therapy stimulators
COMPLETE RECOVERY	5986244	Massage apparatus; Electrotherapy devices for providing transcutaneous electrical nerve stimulation, infrared heat and compression

In addition, Opposer introduced excerpts from four third-party websites advertising massage apparatus and electrostimulatory devices for tissue, bone or joint treatment under the same marks. For example,

- Compex (compex.com);<sup>39</sup>
- iReliev (ireliev.com);<sup>40</sup>
- Breurer (breurer.com);<sup>41</sup> and

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<sup>39</sup> 7 TTABVUE 122-127.

<sup>40</sup> 7 TTABVUE 129-130.

<sup>41</sup> 7 TTABVUE 140-147.

- PlayMakar (playmakar.com).<sup>42</sup>

Evidence of relatedness may include advertisements showing that the goods are advertised together or sold by the same manufacturer or dealer, and copies of prior use-based registrations of the same mark for both applicant's goods and the goods listed in the cited registration. *In re Embiid*, 2021 USPQ2d 577, \*22-23 (TTAB 2021) (citing *Ox Paperboard LLC*, 2020 USPQ2d 10878, \*5 (TTAB 2020); *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002) (evidence that "a single company sells the goods and services of both parties, if presented, is relevant to a relatedness analysis")). We therefore find the registrations and websites probative to demonstrate that the goods are related.

While Applicant concedes the parties' goods "may broadly pertain to goods used in the treatment or management of or therapy for muscle pain and injury,"<sup>43</sup> Applicant maintains that the goods are not related.

[B]oth Opposer's and Applicant's products provide therapy, but that is where any similarity between the respective goods ends. Opposer's goods are household personal percussive massagers used by athletes and average citizens alike. Opposer's goods solely use percussion to provide therapy, and do not use electrical stimulation. In contrast, Applicant's products are meant for patients of licensed medical professionals who receive a prescription for a specific electrostimulatory therapy. Applicant's products do not use percussion or mechanical energy as the therapeutic mechanism, only electricity. Further, unlike Opposer's goods, which are not attached to the body by any means other than the user's hand, Applicant's goods are stationary and cannot be easily moved between body locations. Likewise, because of the nature of the electrical

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<sup>42</sup> 7 TTABVUE 149-165.

<sup>43</sup> Applicant's Brief, p. 8 (20 TTABVUE 13).

stimulation component, Applicant's intended products will be visually distinct from Opposer's products and do not resemble guns. Thus, while both provide therapy, the parties' products do so in entirely separate and different ways, and through wholly unrelated mechanisms, and therefore cannot be considered "related" for the purposes of analyzing likelihood of confusion.<sup>44</sup>

First, the issue is not whether purchasers will confuse the parties' products, but rather whether there is a likelihood of confusion as to the source of the goods. *In re Cook Med. Tech. LLC*, 105 USPQ2d 1377, 1380 (TTAB 2012); *Helene Curtis Indus.*, 13 USPQ2d at 1624; *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984).

Second, we must consider the goods as the parties describe them in the applications and pleaded registration. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1321, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Octocom Sys, Inc. v. Houston Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed."); *Paula Payne Prods. v. Johnson Publ'g Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) ("Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods.").

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<sup>44</sup> Applicant's Brief, pp. 9-10 (20 TTABVUE 14-15).

Third, we do not read limitations into the identification of goods. *i.am.symbolic*, 123 USPQ2d at 1748; *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983) (“There is no specific limitation and nothing in the inherent nature of Squirtco’s mark or goods that restricts the usage of SQUIRT for balloons to promotion of soft drinks. The Board, thus, improperly read limitations into the registration”); *In re Thor Tech*, 90 USPQ2d 1634, 1638 (TTAB 2009) (“We have no authority to read any restrictions or limitations into the registrant’s description of goods.”).

Applicant’s description of goods does not restrict its electrical stimulation devices to “patients of licensed medical professionals who receive a prescription for a specific electrostimulatory therapy.” We may not limit, by resort to extrinsic evidence, the scope of goods as identified in the subject applications. *E.g.*, *Dixie Rests.*, 41 USPQ2d at 1534; *In re Fisher Sci. Co.*, 440 F.2d 43, 169 USPQ 436, 437 (CCPA 1971); *In re La Peregrina Ltd.*, 86 USPQ2d 1645, 1646 (TTAB 2008); *In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764 (TTAB 1986). Therefore, we must presume that Applicant’s electrostimulatory devices include over-the-counter devices, as well as doctor prescribed devices.

Likewise, Opposer’s description of goods does not limit or restrict its products to devices that use percussion to provide therapy. Opposer’s description of goods include “electric vibrating massager(s).” Applicant’s “electrostimulatory devices for tissue,

bone and/or joint treatment” is broad enough to encompass an “electric vibrating massager.”<sup>45</sup>

At the oral hearing, Applicant asserted that the “medical devices” prefix in its description of goods implies doctor intervention. However, the PlayMakar website (playmakar.com) advertises the sale of its electrical muscle stimulator, a transcutaneous electrical nerve stimulation device used by doctors, online without a doctor prescription or recommendation.<sup>46</sup> Thus, electrostimulatory devices do not require a doctor to purchase.

We find that the goods are related.

**B. Established, likely-to-continue channels of trade and classes of consumers.**

In addition to the four third-party websites showing the same entities selling both massage apparatus and electrostimulatory devices under the same marks discussed above, Opposer also introduced three third-party websites showing the same entity advertising the sale of both types of products produced by different entities. We list those websites below:

- Rehab Mart (rehabmart.com);<sup>47</sup>
- Scrip Hessco (scripshessco.com);<sup>48</sup> and

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<sup>45</sup> As noted above, Applicant concedes the products of both parties provide therapy. Applicant’s Brief, pp. 9-10 (20 TTABVUE 14-15).

<sup>46</sup> 7 TTABVUE 154-156.

<sup>47</sup> 7 TTABVUE 132-135.

<sup>48</sup> 7 TTABVUE 137-138.

- Tens Pro (tenspro.com).<sup>49</sup>

As noted above, Applicant concedes that both parties' products "broadly pertain to goods used in the treatment or management of or therapy for muscle pain and injury."<sup>50</sup> Therefore, Opposer and Applicant will sell these products to the same classes of consumers (i.e., people seeking relief from muscle pain or injury).

Applicant again relies on extrinsic evidence improperly to limit the channels of trade and classes of consumers asserting that it only will sell its products directly to licensed medical professionals and to patients with a prescription. In the absence of restrictions in the applications, we presume the products travel in all channels of trade normal for those unrestricted goods and that they are available to all classes of consumers for those products with or without a prescription. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (quoting *Hewlett-Packard*, 62 USPQ2d at 1005); *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983). *See also Bercut-Vandervoort & Co.*, 229 USPQ at 764 (evidence that relevant goods are expensive wines sold to discriminating purchasers must be disregarded given the absence of any such restrictions in the application or registration).

We find that the channels of trade and classes of consumers are similar.

### **C. Conditions under which and customers to whom sales are made.**

As noted above, the goods at issue are, inter alia, Applicant's "electrostimulatory

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<sup>49</sup> 7 TTABVUE 167-182.

<sup>50</sup> Applicant's Brief, p. 8 (20 TTABVUE 13).

devices for tissue, bone and/or joint treatment” and Opposer’s “massage apparatus.”

The record demonstrates that massage apparatus similar to Opposer’s devices cost \$40-\$600.<sup>51</sup> Electrostimulatory devices as set forth in Applicant’s description of goods cost \$60-\$3,000.<sup>52</sup>

By virtue of the therapeutic nature of the products and their cost, we find that consumers are likely to exercise more than ordinary care when purchasing such products.

**D. Strength of Opposer’s mark.**

In determining the strength of a mark, we consider both its inherent strength, based on the nature of the mark itself, and its commercial strength, based on the marketplace recognition value of the mark. *See In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) (“A mark’s strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength (secondary meaning).”); *Top Tobacco, L.P. v. N. Atl. Operating Co., Inc.*, 101 USPQ2d 1163, 1171-72 (TTAB 2011) (the strength of a mark is determined by assessing its inherent strength and its commercial strength); *Tea Bd. of India v. Republic of Tea Inc.*, 80 USPQ2d 1881, 1899 (TTAB 2006); 2 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:80 (5th ed. 2021) (“The first enquiry focuses on the inherent potential of the term at the time of its first use. The second evaluates the actual customer recognition value of the mark at the time registration

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<sup>51</sup> 7 TTABVUE 123-124, 129-130, 135, 137, 149, 175, and 181.

<sup>52</sup> 7 TTABVUE 123, 125-127, 132-134, 138, 154, 160, 168, 172-174, and 177.

is sought or at the time the mark is asserted in litigation to prevent another's use.”). Market strength is the extent to which the relevant public recognizes a mark as denoting a single source. *Tea Bd. of India v. Republic of Tea Inc.*, 80 USPQ2d at 1899. In other words, it is similar to acquired distinctiveness.

For purposes of analysis of likelihood of confusion, a mark's renown may “var[y] along a spectrum from very strong to very weak.” *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017) (internal quotations omitted). The proper standard is the mark's “renown within a specific product market,” *id.*, and “is determined from the viewpoint of consumers of like products,” *id.* at 1735, and not from the viewpoint of the general public.

#### 1. **Inherent Strength**

Because Opposer's mark is registered on the Principal Register, with no claim of acquired distinctiveness under Section 2(f), we presume it is inherently distinctive, i.e., that it is at worst suggestive of the goods. 15 U.S.C. § 1057(b) (registration is “prima facie evidence of the validity of the registered mark”); *In re Fiesta Palms, LLC*, 85 USPQ2d 1360, 1363 (TTAB 2007) (when mark is registered on the Principal Register, “we must assume that it is at least suggestive”).

To show that Opposer's mark is conceptually weak, Applicant introduced 12 third-party registrations featuring a “Thera-formative” prefix in connection with massage apparatus. We list the registrations below:<sup>53</sup>

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<sup>53</sup> 11 TTABVUE 21-210.

We may use third-party registrations in the manner of a dictionary to show how consumers perceive a term. *See Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d

<b>Mark</b>	<b>Reg. No.</b>	<b>Pertinent Goods</b>
THERAVOLT	6068295	Electric massage appliances
THERAVIBE	5508418	Electric massage appliances
THERA-TREE	6056084	A non-riding nerve stimulating device producing an electromagnetic field to provide physiological and metabolic benefit
THERA-TRAINER LYRA	5477837	Physical exercise apparatus for therapeutic, medical, and rehabilitative use; electronic stimulation apparatus for physiotherapy
THERATOGS	6141823	Orthotic systems providing alignment and biomechanical improvements comprising of orthotics for mammalian upper and lower torso, hip and pelvis, and upper and lower extremities; Lower body alignment apparatus for medical purposes
THERA-STICK	4705639	therapeutic exercise roller with handles for mobilizing tissue of the human body to enhance fitness, sports performance, physical therapy, activities of daily living, accelerating healing, and decreasing pain
THERA-ROLL	3715595	Therapeutic exercise roller for mobilizing tissue of the human body to enhance fitness, sports performance, physical therapy, occupational therapy, activities of daily living, accelerating healing, and decreasing pain.
THERA-GUIDE	5080877	Range of motion medical device, namely, a hand and foot medical device providing a range of motion for pre and post surgery designed to assist the patient with increasing range of motion with and without resistant bands.

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1671, 1675 (Fed. Cir. 2015) (“[a] real evidentiary value of third party *registrations* per se is to show the sense in which ... a mark is used in ordinary parlance.”) (citing 2 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:90 (4th ed. 2015); *Institut National des Appellations D’Origine v. Vintners Int’l Co. Inc.*, 958 F.2d 1574, 22 USPQ2d 1190, 1196 (Fed. Cir. 1992) (third-party registrations show the sense in which a word is used in ordinary parlance and that a particular term has descriptive significance as applied to certain goods or services)).

Mark	Reg. No.	Pertinent Goods
THERA-BAND FIRST STEP TO FOOT RELIEF	4253184	Kit, consisting essentially of resistance band(s), non-electric foot massage apparatus, topical analgesic, and instructional booklet, for treatment of foot pain
THERA GLIDE	5239320	Hand and foot medical device for increasing range of motion, for range of motion patients, athletes, senior citizens, person requiring increased range of motion
THERA*PRESS	4037776	Massage apparatus
THERA CANE	1687739	Hand tool for massaging parts of a body

The third-party registrations submitted by Applicant also include 35 registrations for Thera-formative marks for medical or rehabilitative products other than massage apparatus.

With respect to the suffix “Gun,” Opposer’s massage apparatus and similar products call to mind a gun. For example,

- Vogue Magazine website (vogue.com) posted “5 Easy Ways to Jump-Start Your Fitness Goals in 2019” (January 19, 2019) features a photograph of one of Opposer’s massage apparatus reproduced below:<sup>54</sup>

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<sup>54</sup> 7 TTABVUE 186. On the other hand, “7 Gadgets Star Athletes Can’t Live Without” posted on Stack.com referred to Opposer’s product “looks like an electric drill.” 7 TTABVUE 195. *See also* “All About the TheraGun, the Self-Massage Device That’s Taking Over Instagram” (June 28, 2018) posted on Self.com (7 TTABVUE 201) (“The massage device looks like a power drill.”); “Meet the Theragun, the NBA’s Secret Sideline Weapon” (June 15, 2017) posted on Menshealth.com (7 TTABVUE 223) (“The Theragun looks more like a power tool than your average recovery device.”); “Recovery Revolution: How Sports Tech Dethroned Opioids” (June 29, 2018) posted on Papermag.com (7 TTABVUE 230) (“Take the TheraGun ... the vibrating, power tool-resembling device.”); “Goods Vibes Only: Percussive Massage Therapy Devices Are Making Waves in Sports” (January 22, 2018) posted on the Sports Illustrated magazine website (si.com) (7 TTABVUE 261) (“It looks like a power drill, moves like a jackhammer and sounds like a machine gun.”); “Why celebrities and athletes are going gaga for this massage gadget” (November 10, 2018) posted on the Fast Company website (fastcompany.com) (“[I]t looks like the robotic version of a woodpecker.”).



• RehabMart website (rehabmart.com) advertises the sale of the “Body Drummer Pro Standard Percussion Massage Gun.”<sup>55</sup> We reproduce below a photograph of the product:



• TensPros website (tenspros.com) advertises the sale of a “VibRelief – Percussive Vibration Massage Gun.”<sup>56</sup> We reproduce below a photograph of the product:

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<sup>55</sup> 7 TTABVUE 135.

<sup>56</sup> 7 TTABVUE 175 and 181.



• Forbes Magazine website (forbes.com) posted “The Best Handheld Massagers” (September 8, 2019) including a review of the Hyperice Hypervolt reproduced below<sup>57</sup> and the TimTAM Deep Tissue Massage Gun reproduced below:<sup>58</sup>



• CNET.com website posted “Best massage gun for 2020: Hypervolt, Theragun, TimTam and more compared” (July 27, 2020) posed images reproduced below of the

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<sup>57</sup> 11 TTABVUE 216.

<sup>58</sup> 11 TTABVUE 217.

Acheway Vibration and Percussion Massager,<sup>59</sup> the Sportneer Percussive Massage Gun,<sup>60</sup> the ExoGun Dream Pro,<sup>61</sup> and the Nordictrack Percussion Recovery Gun.<sup>62</sup>



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<sup>59</sup> 11 TTABVUE 228.

<sup>60</sup> 11 TTABVUE 229.

<sup>61</sup> 11 TTABVUE 233.

<sup>62</sup> 11 TTABVUE 234.

• The Consumer Guide Magazine website (theconsumerguide.com) (August 14, 2020) posed “10 Best Handheld Massagers By Consumer Guide in 2020” including an image of the Opove G3 massage gun reproduced below:<sup>63</sup>



In addition, many publication refer to the massage apparatus as a “gun.” For example,

• Men’s Health Magazine website (menshealth.com) posted “Everything You Need To Know About Massage Guns” (April 1, 2019) referring to massage apparatus as “massage guns.”<sup>64</sup>

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<sup>63</sup> 11 TTABVUE 287.

<sup>64</sup> 7 TTABVUE 248-253.

- Shape.com posted an article, “The Theragun G3 Is the Recovery Tool I Never Knew I Needed,” where the author wrote “I never thought I’d be someone with a fancy massage gun.”<sup>65</sup>

- CNET.com website posted “Best massage gun for 2020: Hypervolt, Theragun, TimTam and more compared” (July 27, 2020) referring to the massage apparatus as massage guns.<sup>66</sup>

- Digital Trends Magazine (digitaltrends.com) posted “Best percussion massage guns for 2020” (May 19, 2020) referring to the massage apparatus as percussion massage guns.<sup>67</sup>

The third-party registration evidence establishes that Thera-formative marks suggest or engender a commercial impression of remedial, rehabilitative, or curative qualities. The third-party Internet evidence establishes that the suffix term “gun” is descriptive of some massage apparatus in the shape of a gun. Thus, Opposer’s mark “Theragun” is a combination of a highly suggestive prefix and descriptive suffix forming a highly suggestive mark.

## **2. Commercial Strength**

Because we have stricken some of Opposer’s rebuttal testimony evidence, the only admissible evidence regarding the commercial strength of Opposer’s THERAGUN mark is favorable unsolicited publicity posted on online.<sup>68</sup> Commercial strength may

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<sup>65</sup> 7 TTABVUE 275.

<sup>66</sup> 11 TTABVUE 224-236.

<sup>67</sup> 11 TTABVUE 238-240.

<sup>68</sup> 7 TTABVUE 184-326.

be measured indirectly by, inter alia, unsolicited media coverage. *See Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1056 (TTAB 2017) (finding petitioner's evidence of commercial strength included unsolicited media coverage). *Cf. ProQuest Info. & Learning Co. v. Jaques R. Island*, 83 USPQ2d 1351 (TTAB 2007) (finding widespread unsolicited media is probative of fame). For example,

- Men's Health (menshealth.com) (April 1, 2019)<sup>69</sup>

### Everything You Need To Know About Massage Guns

Get ready to bounce back from workouts faster, and accelerate your gains, too!

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### What Exactly Is a Massage Gun?

The massage gun trend is a relatively new one in fitness. You've uses foam rollers before, and vibrating foam rollers appeared on the market three of four years ago. The theory behind these foam rollers was that the vibrations confused something call the Golgi tendon response, which would help relax tight muscles.

Then, two years ago, the Theragun took off, kicking off a wave of massage guns. ...

The massage gun generally looks something like a power tool, and once it's turned on, it whirs like one too (although recent models have quieted that). To use it, you simply aim it at your skin, about an inch away, and let it pulsate back and forth, relaxing muscles and promoting bloodflow in much the same way a vibrating roller does. It's easier to use than a foam roller though, and more natural.<sup>70</sup>

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<sup>69</sup> 7 TTABVUE 248-255.

<sup>70</sup> 7 TTABVUE 249-250.

- Vogue (vogue.com)<sup>71</sup>

This Under-\$200 Tool Will Help You Soothe Tense Muscles at Home (May 8, 2000)

Since its launch in 2016, Theragun has become a must-have for many professional athletes and gym enthusiasts alike.

- Vogue (vogue.com)<sup>72</sup>

5 Easy Ways to Jump-Start Your Fitness Goals in 2019 (January 12, 2019)

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Theragun G3 Pro, \$599, [theragun.com](http://theragun.com)

The revolutionary machine known to relieve tight muscles and tough-to-get knots is now lighter and better at preventing injuries than ever before. Should that deep-tissue foot massage not be in the cards for you this week, consider this your arch-saver, especially after taking off those new Jimmy Choo stilettos.<sup>73</sup>

- Stack (stack.com)<sup>74</sup>

7 Gadgets Star Athletes Can't Live Without

TheraGun G2 Pro

The TheraGun is a popular recovery gadget that looks like an electric drill.

It looks like one, too. Press the button and it whirs to life, but instead of driving a screw into a piece of lumber, it drives a high-quality foam attachment into your hamstring.

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<sup>71</sup> 7 TTABVUE 257-259.

<sup>72</sup> 7 TTABVUE 184-192.

<sup>73</sup> 7 TTABVUE 186.

<sup>74</sup> 7 TTABVUE 194-197.

The TheraGun utilizes a vibration frequency that's designed to override the body's natural pain signals. ... That means the device can work on the muscle with pressure deeper than most people's natural pain tolerance would allow.

This type of deep vibration therapy causes muscles to rapidly contract and relax and greatly improves blood flow to allow more oxygenated blood to flow to the muscles, helping them flush out waste and deoxygenated blood and take in nourishments and nutrients quicker and more efficiently.<sup>75</sup>

- Self (self.com)<sup>76</sup>

All About the TheraGun, the Self-Massage Device That's Taking Over Instagram (June 28, 2018)

Experts explain what it can and can't do.

If you follow fitness-loving celebrities like Ashley Graham and Kevin Hart, you've probably seen the Theragun pop up on your feed. The massage device looks like a power drill and rapidly pounds the body at 40 beats per second, using something called "percussive massage therapy" to supposedly relieve muscle pain. The newest version, the G3PRO, costs \$599, and is marketed for at-home use. So how exactly did a physical therapy device become so trendy?

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The TheraGun isn't the only percussive massage device on the market created for this purpose though it may be the most ubiquitous.<sup>77</sup>

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<sup>75</sup> 7 TTABVUE 195. The article refers to Julio Jones using a TheraGun during Super Bowl LI and Kyrie Irving using one during the 2017 NBA Finals.

<sup>76</sup> 7 TTABVUE 199-203.

<sup>77</sup> 7 TTABVUE 201.

- Los Angeles Times (latimes.com) (March 16, 2018)<sup>78</sup>

Inspired by the L.A. Marathon? Here are 10 secrets veteran runners know all about

Prepare to get bit by the running bug.

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#### 4. Knead for speed

Tight calves and hamstrings? Vibrational massage before a race helps work out the kinks, fast – a perfect job for the cordless Theragun G2 Pro. Popular with NFL trainers, this handled power tool lets you get to hard-to-reach body parts and uses jackhammer-like movements to ease your pain. According to inventor Jason Wersland, a Culver City chiropractor, 20 seconds is more than enough to loosen up a tight muscle, with longer sessions appropriate for post-race recovery. \$600.<sup>79</sup>

- GQ.com (August 10, 2018)<sup>80</sup>

Is the Theragun Worth It?

Athletes like Kyrie Irving and Antonio Brown have turned to “percussive therapy” to treat stiff, sore muscles. We decided to see what all the hype is about.

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The main advantage of the Theragun over, say, the stress knot-attenuating superpowers of a foam roller, is that you can target a specific problem area in miniature. ...

There are a few downsides. First, this thing ain’t cheap. A Theragun 2.0 will set you back around \$600. It’s also as loud as a power drill. ...

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<sup>78</sup> 7 TTABVUE 205-215.

<sup>79</sup> 7 TTABVUE 209.

<sup>80</sup> 7 TTABVUE 217-220.

Still there is something wonderfully addictive about it ....<sup>81</sup>

- Men's Health (menshealth.com) (June 15, 2017)<sup>82</sup>

Meet the Theragun, the NBA's Secret Sideline Weapon

The \$600 tool is now popping up as an item to quickly loose muscles among pro athletes

- Sports Illustrated (si.com)<sup>83</sup>

Good Vibes Only: Percussive Massage Therapy Devices Are Making Waves in Sports (January 22, 2018)

It looks like a power drill, moves like a jackhammer and sounds like a machine gun, but you won't find the TheraGun G2PRO in a hardware store or an arsenal. The black-and-blue, handheld massage tool (\$599. theragun.com) is becoming increasingly popular in locker rooms and on the sidelines, as athletes turn to *percussive massage therapy* for quick relief for aching muscles.

With respect to the commercial strength of Opposer's THERAGUN mark, we find the evidence sufficient to show that Opposer's mark falls in the middle of the spectrum of from very strong to very weak. *Joseph Phelps Vineyards*, 122 USPQ2d at 1734. That is, the unsolicited media demonstrates that Opposer's product is commercially successful but it does not demonstrate directly the renown of the mark itself.

In sum, the evidence of record demonstrates that Opposer's mark THERAGUN is conceptually or inherently highly suggestive and that commercially it falls in the middle of the spectrum from very strong to very weak. Thus, Opposer's THERAGUN

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<sup>81</sup> 7 TTABVUE 220.

<sup>82</sup> 7 TTABVUE 222-227.

<sup>83</sup> 22 TTABVUE 261-262.

mark is not entitled to such a broad scope of protection that would prevent the registration of every mark comprising a Thera-formative prefix and gun suffix; it only bars the registration of marks striking enough to Opposer's THERAGUN mark to cause one seeing it to assume there is some connection, association, or other affiliation between the two. *See Anthony's Pizza & Pasta Int'l Inc. v. Anthony's Pizza Holding Co.*, 95 USPQ2d 1271, 1278 (TTAB 2009), *aff'd*, 415 F. App'x. 222 (Fed. Cir. 2010); *Pizza Inn, Inc. v. Russo*, 221 USPQ 281, 283 (TTAB 1983).

**E. The similarity or dissimilarity of the marks.**

We now turn to the *DuPont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression. *DuPont*, 177 USPQ at 567. "Similarity in any one of these elements may be sufficient to find the marks confusingly similar." *In re Inn at St. John's, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)); *accord Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) ("It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.") (citation omitted).

In comparing the marks, we are mindful "[t]he proper test is not a side-by-side comparison of the marks, but instead 'whether the marks are sufficiently similar in terms of their commercial impression' such that persons who encounter the marks would be likely to assume a connection between the parties." *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (quoting *Coach Servs.*

*Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012)).

The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F.2d 1005, 169 USPQ 39, 40 (CCPA 1971); *L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012); *Winnebago Indus., Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). As discussed above, the average customer for electrostimulatory devices for tissue, bone or joint treatment and for massage apparatus will exercise more than ordinary care.

Applicant is seeking to register THERAGEN, in both standard characters and the composite form reproduced below:



Opposer's mark is THERAGUN, in standard characters.

The dominant portion of Applicant's composite mark is the term "Theragen." In the case of composite marks consisting of words and a design, we normally accord the literal portion greater weight because purchasers will use the verbal portion to request the products and the literal component usually appears alone when used in text. *See Viterra*, 101 USPQ2d at 1908 and 1911 (citing *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 200 (Fed. Cir 1983)). *See also Jack Wolfskin*, 116 USPQ2d at

1134. There is nothing improper in stating that, for rational reasons, we have given more or less weight to a particular feature of a mark, such as a common dominant element, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *Viterra*, 101 USPQ2d at 1908; *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

In addition, the design element in the composite mark is not so significant as to distinguish the word portions of the marks. *See In re Denisi*, 225 USPQ 624, 624 (TTAB 1985) (“[I]f the dominant portion of both marks is the same, then confusion may be likely notwithstanding peripheral differences.”).

Because Opposer registered its mark in standard character form, it is not limited to any particular depiction. The rights associated with a mark in standard characters reside in the wording, and not in any particular display. Inasmuch as Applicant also seeks registration of a mark in standard characters, Applicant may depict its mark in any manner, regardless of the font style, size, or color, and might display it in a manner similar to Registrant’s mark. *Viterra*, 101 USPQ2d at 1909-11; *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1259 (Fed. Cir. 2011); *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983) (rejecting argument that for purposes of determining whether two marks are similar, a mark in a typed drawing (equivalent to modern standard character format) is distinct from such mark in a logo format; “[b]y presenting its mark in a typed drawing, a *difference* cannot legally be asserted by that party” (emphasis in original)).

Similarly, Opposer is free to use any font style, size, or color for its standard character mark THERAGUN. For example, Opposer may display its mark as reproduced below:

# Theragun

Therefore, as demonstrated, the parties' marks may be displayed with a similar appearance.

In addition, THERAGUN and THERAGEN are similar in appearance because they both start with a Thera-formative prefix followed by "gun" or "gen"; the difference being Applicant's use of the letter "E" for Opposer's letter "U." Slight differences in marks do not normally create dissimilar marks. *See Mag Instr. Inc. v. Brinkmann Corp.*, 96 USPQ2d 1701, 1714-15 (TTAB 2010) (difference of a single letter does not suffice to distinguish MAG STAR from MAXSTAR); *In re Great Lakes Canning, Inc.*, 227 USPQ 483, 485 (TTAB 1985) ("Moreover, although there are certain differences between the [marks' CAYNA and CANA] appearance, namely, the inclusion of the letter 'Y' and the design feature in applicant's mark, there are also obvious similarities between them. Considering the similarities between the marks in sound and appearance, and taking into account the normal fallibility of human memory over a period of time (a factor that becomes important if a purchaser encounters one of these products and some weeks, months, or even years later comes across the other), we believe that the marks create substantially similar commercial impressions."); *Hercules v. Nat'l Starch*, 223 USPQ 1244, 1246 (TTAB 1984) (NATROSOL and NATROL found similar because "the clearly dominant aspect of

both marks is that the first four letters and the final two are the same”). Likewise, the marks are phonetically similar, although not identical.

Finally, the marks engender similar, albeit not the same, commercial impressions. The MERRIAM-WEBSTER DICTIONARY (merriam-webster.com) defines the term “Gen,” inter alia, as a “genus: kind genotype.”<sup>84</sup> It lists “item” as a synonym.<sup>85</sup> Therefore, “Theragen” engenders a commercial impression of a therapeutic item and a therapy item could include a therapy gun.

At the hearing, Applicant asserted that because Applicant’s products are used for post-surgical regenerative therapy, the commercial impression of its THERAGEN mark is therapy regeneration or therapy generation. The RANDOM HOUSE UNABRIDGED DICTIONARY (2021) defines “regeneration,” inter alia, as “the restoration of new growth by an organs, tissues, etc., that have been lost, removed, or injured.”<sup>86</sup> The AMERICAN HERITAGE STEDMAN’S MEDICAL DICTIONARY (2002) defines “generation,” inter alia, as “[t]he act or process of generating; origination, production,

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<sup>84</sup> 11 TTABVUE 305-06.

<sup>85</sup> *Id.* at 306.

Applicant argues, “Gen’ does not have a formal definition, but is often used as the short form for the term ‘generation.’” Applicant’s Brief, p. 7 (20 TTABVUE 12). However, as applied to electrostimulatory devices for tissue, bone or joint treatment, we find it is more likely that consumers will perceive “Gen” in THERAGEN as a therapeutic thing rather than a therapeutic generation.

<sup>86</sup> Dictionary.com accessed September 23, 2021.

The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff’d*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016); *In re S. Malhotra & Co. AG*, 128 USPQ2d 1100, 1104 n.9 (TTAB 2018); *In re Red Bull GmbH*, 78 USPQ2d 1375, 1378 (TTAB 2006).

or procreation.”<sup>87</sup> Thus, the commercial impression engendered by the mark THERAGEN may be therapy generation or creation which is the purpose of Opposer’s THERAGUN massager. We find both marks engender the commercial impression of delivering therapy.

Applicant argues the differences between the marks are “key because where, as here ..., the consuming public is exposed to numerous third party uses of similar marks for related goods and services, consumers will look to differences in the marks (as well as differences in the goods or services themselves) to distinguish their source and are not likely to be confusion [sic].”<sup>88</sup> There are two problems with Applicant’s argument. First, the third-party registrations Applicant introduced are not evidence that third parties are actually using those marks. Absent evidence of actual use, third-party registrations have little probative value because they are not evidence that the marks are in use on a commercial scale or that the public has become familiar with them. *See Olde Tyme Foods, Inc. v. Roundy’s, Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1545 (Fed. Cir. 1992); *Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462, 463 (CCPA 1973) (the purchasing public is not aware of registrations reposing in the USPTO); *AMF Inc. v. Am. Leisure Prods., Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973); *Productos Lacteos Tocumbo S.A. de C.V. v. Paletteria La Michoacana Inc.*, 98 USPQ2d 1921, 1934 (TTAB 2011).

[I]t would be sheer speculation to draw any inferences about which, if any of the marks subject of the third[-]party registrations are still in use. Because of this doubt,

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<sup>87</sup> Dictionary.com (accessed September 23, 2021).

<sup>88</sup> Applicant’s Brief, p. 7 (20 TTABVUE 12).

third[-]party registration evidence proves nothing about the impact of the third-party marks on purchasers in terms of dilution of the mark in question or conditioning of the purchasers as to their weakness in distinguishing source.

*In re Hub Distrib., Inc.*, 218 USPQ 284, 286 (TTAB 1983). As the Court pointed out in *Lilly Pulitzer, Inc. v. Lilli Ann Corp.*, 376 F.2d 324, 153 USPQ 406, 407 (CCPA 1967), “the existence of these registrations is not evidence of what happens in the market place or that customers are familiar with their use.” Where, as here, the “record includes no evidence about the extent of [third-party] uses ... [t]he probative value of this evidence is thus minimal.” Where, as here, “the record includes no evidence about the extent of [third-party] uses ... [t]he probative value of this evidence is thus minimal.” *Han Beauty, Inc. v. Alberto-Culver Co.*, 236 F.3d 1333, 57 USPQ2d 1557, 1561 (Fed. Cir. 2001). *See also Olde Tyme Foods Inc. v. Roundy’s Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1545 (Fed. Cir. 1992) (“As to strength of a mark, however, registration evidence may not be given *any* weight”).

Second, none of the marks in the third-party registrations Applicant introduced is closer to Opposer’s THERAGUN mark than Applicant’s THERAGEN marks. *See In re I-Coat Co.*, 126 USPQ2d 1730, 1735 (TTAB 2018) (none of the third-party marks are as similar to the mark in the cited registration as Applicant’s mark) (citing *Specialty Brands, Inc. v. Coffee Bean Distribs., Inc.*, 748 F.2d 669, 223 USPQ 1281, 1284-85 (Fed. Cir. 1984) (“Applicant introduced evidence of eight third-party registrations for tea which contain the word ‘SPICE’, five of which are shown to be in use. None of these marks has a ‘SPICE (place)’ format or conveys a commercial impression similar to that projected by the SPICE ISLANDS mark, and these third-

party registrations are of significantly greater difference from SPICE VALLEY and SPICE ISLANDS than either of these two marks from each other.”)). *See also Palisades Pageants, Inc. v. Miss Am. Pageant*, 442 F.2d 1385, 169 USPQ 790, 793 (CCPA 1971) (“[A]ppellant’s mark is closer to appellee’s than even the closest of the third-party registrations.”).

We find that the marks are similar in their entireties in terms of appearance, sound and commercial impression.

#### **F. Conclusion**

Because the marks are similar, the goods are related, and the goods are offered in the same channels of trade to the same classes of consumers, we find that Applicant’s mark THERAGEN, in standard character form, and THERAGEN and design, both for “medical devices, namely, electrostimulatory devices for tissue, bone and/or joint treatment, medical treatment apparel, and a kit comprising an electrostimulatory device and medical treatment apparel” are likely to cause confusion with Opposer’s registered mark THERAGUN, in standard character form, for the goods listed below:

Massage apparatus; Massage apparatus and instruments; Massage apparatus for massaging injured muscles; Massaging apparatus for personal use; Vibrating apparatus used to stimulate muscles and increase strength and physical performance for health and medical purposes; Electric massage appliances, namely, electric vibrating massager; Electric massage appliances, namely, electric vibrating massager; Foot massage apparatus.

The slightly increased care with which the goods may be purchased does not outweigh the other *DuPont* factors. On balance, we find a likelihood of confusion.

**Decision:** We sustain the opposition.